United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

74-1432

To be argued by
HARRY GURAHIAN

B P/S

United States Court of Appeals

For the Second Circuit

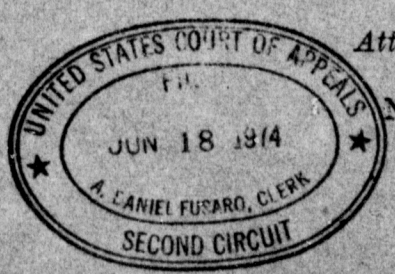
STERLING NATIONAL BANK AND
TRUST CO. OF NEW YORK,
Plaintiff-Appellee,

against

FIDELITY MORTGAGE INVESTORS,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York

PLAINTIFF-APPELLEE'S BRIEF



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PLAINTIFF-APPELLEE'S BRIEF

Statement of Facts

This appeal is from an order granting summary judgment to the plaintiff, Sterling National Bank & Trust Company of New York (Sterling), against defendant, Fidelity Mortgage Investors (Fidelity), in an action for the $1,600,000.00 unpaid balance on a $2,000,000.00 promissory note discounted at the rate of 9¼% per annum. The proceeds of the loan in the sum of $1,957,861.11 was deposited in Fidelity's account at Sterling.

The action had been instituted in the Supreme Court of the State of New York, County of New York by service of a summons and notice of motion for summary judgment together with accompanying affidavits pursuant to CPLR §3213. Service was made in Florida pursuant to CPLR §302 (1) (a), the long arm statute of New York. Prior to the return date of the motion, Fidelity caused the action to be removed to the District Court on the grounds of diversity of citizenship. By virtue of the removal Fidelity had five additional days after the filing of its petition in which to answer. Instead of answering, Fidelity's attorneys insisted that Sterling serve a new complaint. Fidelity's attorneys were informed that no additional complaint was required and that defendant's answer to the motion was overdue under Rule 81c. The motion papers take the place of and act as the complaint and repleading is unnecessary unless the Court so orders. *Rules of Civil Procedure 81(c). Istituto Per Lo Sviluppo Economico Dell' Italia Meridionale* v. *Sperti Products, Inc.*, 47 FRD 310 (U.S.D. Ct., Southern District, New York 1969).

Since Fidelity was in default in answering, Sterling extended its counsel an opportunity to cure Fidelity's default but counsel persisted in refusing to answer. Counsel was advised that if he still refused to answer notwithstanding Sterling's offer to accept a belated answer, a default judgment would be entered (Appendix 37a & 38a). Consequently, the default judgment was properly entered because appellant had deliberately defaulted. Despite the deliberate default, Judge Frankel gave Fidelity an opportunity to answer because of the large amount of the judg-

ment (Appendix 15a). After the default was vacated, a motion for summary judgment was brought on by Sterling and was granted in its favor for $1,600,000.00 plus $29,-193.00 interest (computed at 6%) totaling $1,629,193.00.

ARGUMENT

POINT I

The Court had *in personam* jurisdiction over Fidelity.

A. Fidelity's transaction of "*any business*" was well within the statutory meaning (CPLR §302).

Service of the summons and accompanying pleadings upon a party not found within the state is made in the manner provided by New York statutes, *RCP 4(e)*. Under CPLR §302, the Court has personal jurisdiction of a non-domiciliary as to a cause of action arising from the transaction of any business within the state.

> §302. Personal jurisdiction by acts of non-domiciliaries
>
> (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:
>
> 1. transacts any business within the state;

Fidelity has misquoted CPLR §302 by omitting "any" in citing the section (Brief p. 10). Deliberate or not, the omission symbolizes the basic approach in Fidelity's brief that all contacts must be in New York to subject Fidelity to jurisdiction. The New York law is that "any" business

in New York relating to the particular transaction from which the cause of action arises subjects defendant to the jurisdiction. *Longines-Wittnauer Co.* v. *Barnes & Reinecke,* 15 N.Y. 2d 443, 209 N.E. 2nd 68 (1965).

CPLR §313 provides that in such instance, service of the summons may be made without the state in the same manner as within the state by any person authorized to make service by the laws of the state in which service is made. Service was made upon Fidelity by the Sheriff of Duval County, Florida, and proof of service was filed in New York.

The question then is what constitutes the transaction of any business within the state in this case.

The facts are:

Fidelity opened a New York checking account with Sterling on April 6, 1972. It was extended a line of credit of $1,000,000.00 at Sterling in New York and borrowed thereunder in New York. The line was expanded to $2,-000,000.00, and on August 17, 1973 Fidelity borrowed $2,000,000.00 evidenced by its note delivered by mail to Sterling in New York (Appendix 54a). The loan was processed at Sterling in New York and effected by crediting Fidelity's account at Sterling in the sum of $1,957,861.11, the net amount of the loan and pursuant to Fidelity's order, $1,757,861.11 was transferred to Fidelity's account at Morgan Guaranty Trust Company in New York (Appendix 57a). Demonstrably, therefore, the business was transacted and the agreement performed in New York. The test of "any" business was met conclusively (*Longines-Wittnauer* v. *Barnes & Reinecke, supra*).

In the *Longines* case, the Court discussed the effect of *International Shoe Co.* v. *Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945) and *McGee* v. *International Life Insurance Co.,* 335 U.S. 220, 78 S. Ct. 199, 2 L. Ed. 2nd 223 (1957) upon the concept of *in personam* jurisdiction and concluded that those decisions had opened a broad area for the exercise of jurisdiction over nonresident parties. The Court of Appeals held, following the *International Shoe Company* case, *supra* that the crucial question to be decided in each case was whether there were minimum contacts of the nonresident with the forum state such that the maintenance of the suit would not affect "traditional notions of fair play and justice". See also *Benedict Corp.* v. *Epstein,* 47 Misc. 2nd 316, 262 N.Y.S. 2nd 726 (1965). This is different from "doing business" in New York under CPLR §301 which is not the criterion for jurisdiction in this case. See also *McKinney's Consolidated Laws of New York Annotated, Practice Commentaries* CPLR §302, C302:1 by *Joseph M. McLaughlin,* where he says on page 62 in discussing *International Shoe Co.* v. *Washington, supra,*

> "In the final category fall those defendants who perform 'single or occasional acts * * * [which] because of their nature and quality and the circumstances of their commission, may be deemed sufficient' to subject the defendant to personal jurisdiction on causes of action related to those activities (66 S. Ct. at 159, 326 U.S. at 318). It is in this class that the new provision, a single-act statute, falls."

The whole thrust of Fidelity's argument based upon its misquotation and misinterpretation of CPLR §302 (a) (1) is misdirected in that it confuses "does business within the state" with "transacts *any* business within the

state'' (Italics ours). It is unimportant therefore that Fidelity's business is in Florida and it does not ''do business'' in New York.

The fact that the note might have been signed and mailed from outside New York is not determinative of the question of jurisdiction. The statutory test of transacting any business within the state may be satisfied by a showing of other purposeful acts performed in this state in relation to the loan whether preliminary or subsequent to the execution of the note. The New York ''long arm'' statute was not meant to be limited only to agreements made within the state but the criterion for jurisdiction is the transaction of any business within the state from which the cause of action arises. The New York courts have construed §302(a) broadly, *Longines-Wittnauer Co.* v. *Barnes & Reinecke, supra.*

See also *Lewis & Eugenia Van Wezel Foundation Inc.* v. *Guerdon Industries Inc.*, 450 F. 2nd 1264 (U.S. Ct. App. 2nd Cir. 1971).

The borrowing of money from a New York bank constitutes the transaction of business within the state for the purpose of subjecting the borrower to *in personam* jurisdiction of the New York courts. *Lewis & Eugenia Van Wezel Foundation Inc.* v. *Guerdon Industries Inc. supra; Irving Trust Company* v. *Smith,* 349 F. Supp. 146 (U.S. D. Ct. Southern Dist. N.Y. 1972). The note being payable in New York, the default gives rise to a cause of action arising from the transaction of business within New York, *Benedict Corp.* v. *Epstein, supra.*

The loan transaction in this case was not a transitory act unrelated to this state. The defendant purposefully

availed itself of a loan of a substantial sum of money from a New York bank. The engagement by the defendant in this purposeful activity constituted the transacton of business within New York. *Pacer International Corp.* v. *Otter Distribution Co.*, 51 Misc. 2nd 737, 273 N.Y.S. 2nd 829 (Sup. Ct., N.Y. County 1966); *Gotham Life* v. *Ramey*, 359 F. Supp. 134 (U.S.D. Ct. D. of C. 1973); *Longines-Wittnauer* v. *Barnes & Reinecke, supra.*

In *Francis I. DuPont & Co.* v. *Chelednik*, 69 Misc. 2nd 362, 330 N.Y.S. 2nd 149 (App. T., 1st Dep't 1971), the Court held that a New Jersey resident, who never physically entered the State of New York, would be subject to jurisdiction under Section 302 of the CPLR solely because he maintained a stock brokerage account with a firm located in New York City.

The acts of the defendant in mailing the note to plaintiff, a New York bank, the making of the loan in New York payable here, the crediting of the loan proceeds to defendant's account in New York and the subsequent transfer, at its direction, of the bulk of said funds to another account maintained at a New York bank (all part of the loan transaction) each constitute an act in the transaction of business in New York. Any one of these acts is sufficient to confer *in personam* jurisdiction upon the defendant. The whole bundle of such acts removes any scintilla of doubt.

B. The authorities cited by Fidelity are inapplicable.

The authorities cited by Fidelity in its brief are inapplicable. Thus *Impex Metals Corp.* v. *Orement Chemical Corp.*, 333 F. Supp. 771 (S.D. N.Y. 1971) (Fidelity's brief,

footnote page 19) is an action against a New Jersey corporation arising out of the sale of goods manufactured in Yugoslavia and shipped to California. The holding that execution of a contract in New York without other meaningful contacts is insufficient to constitute the transaction of business in New York is inapplicable to this case. It is admitted here that the note was executed in Florida. There is however an entire group of significant New York contacts upon which jurisdiction is firmly grounded. (See discussion *supra*).

To the extent that *Impex* is in point, it is against Fidelity for the Court stated:

> "* * * deposit of funds in New York may prove to be a transaction of business out of which the action arose and upon which jurisdiction may be predicated." (p. 774)

The same applies to *Millner Co.* v. *Noudar Lda,* 24 App. Div. 2nd 326, 330, 331, 266 N.Y.S. 2nd 289 (1st Dept. 1966) cited by Fidelity on page 14 of its brief where the court said that if the defendant maintained a bank account in New York as the plaintiff contended that would be ground for assumption of jurisdiction under CPLR §302 (a) (1).

Wirth v. *Prenyl, S.A.,* 29 App. Div. 2nd 373, 288 N.Y.S. 2nd 377 (1st Dept. 1968) (Fidelity's brief p. 16) involved a contract for the shipment of machinery from the United Kingdom to Argentina and notes to be delivered upon presentation of bills of lading and sight drafts (presumably under a letter of credit arrangement). The contract was to be performed in Argentina by the shipment of machinery and equipment there.

Bankers Commercial Corp. v. *Alto, Inc.*, 30 App. Div. 2nd 517, 289 N.Y.S. 2nd 993 (1st Dept. 1968) (Fidelity's brief pp. 17, 18) involved an assigned conditional sales contract. The action arises apparently from the sale of goods in Virginia to a Virginia corporation.

Gelfand v. *Tanner Motor Tours, Ltd.*, 339 F. 2nd 317 (3rd Cir. 1964) (Fidelity's brief p. 23) was an action against a foreign corporation for personal injuries sustained on a bus trip on route from Nevada to Arizona. Plaintiff's claim that defendant transacted business in New York was based on the purchase of tickets from a Long Island Travel Agency having no association with the defendants. Of course, under these circumstances, the Court held there was no jurisdiction. Similarly *Greenberg* v. *R.S.P. Realty Corp.*, 22 App. Div. 2nd 690, 253 N.Y.S. 2nd 344 (2nd Dept. 1964) (Fidelity's brief p. 23) involved a negligence action for injuries sustained at a hotel located in New Jersey. The alleged transaction of business in New York rejected by the Court was that the hotel advertised in New York.

International Shoe Co. v. *Washington, supra,* cited on page 11 of Fidelity's brief is another instance of citing authority supporting Sterling, since the minimum contacts contemplated are more than fulfilled by the facts in the case at bar. The Court says at 326 U.S. 310, 319:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an

individual or corporate defendant with which the state has no contacts, ties or relations''.

The contacts in the instant case are substantial and amply fulfill these requirements.

McKee Electric Co. v. *Rauland-Borg Corp.*, 20 N.Y. 2nd 377, 283 N.Y. Supp. 2nd 34 (1967) cited on pp. 14 and 19 of Fidelity's brief is inapplicable since the claimed act constituting defendant's transaction of business in New York was that plaintiff contacted defendant's New York representative, an independent businessman not employed by defendant and through his intervention became one of defendant's distributors. Since the New York representative was an independent agent, the court found there were insufficient minimum contacts to acquire personal jurisdiction.

Fidelity's reliance on the *McKee Electric Co.* case *supra,* is misguided. As a general rule, the place where a contract is to be performed is more important for jurisdictional purposes than the place where it is executed. It is not a requirement for jurisdiction that the defendant or its agents should have come physically to New York. *McKinney's Practice Commentaries* by *Joseph M. McLaughlin,* CPLR §302, C 302.10 & 302.11. Thus, in *Longines, supra,* although Illinois was where the primary contract was executed, New York jurisdiction was sustained.

Hubbard, Westervelt & Mottelay, Inc. v. *Harsh Building Co.*, 28 App. Div. 2nd 295, 284 N.Y.S. 2nd 879 (1st Dept. 1967) cited on pages 15 and 20 of Fidelity's brief, where jurisdiction in an action on a note payable in New York was denied is distinguishable in several vital points from the instant case. In the cited case there was no loan. The

note, executed and delivered in Arizona was for services rendered by a mortgage broker in obtaining a mortgage loan to purchase and develop property there. In the instant case although the note was executed in Florida, it was not delivered there but was mailed to and received in New York where the loan was made. Notwithstanding the distinguishability of the cited case, it is a poorly reasoned decision and the court is respectfully referred to the lucid dissenting opinion.

The *Hubbard* case was distinguished in *Carrolton Associates* v. *Abrams,* 57 Misc. 2nd 617, 293 N.Y.S. 2nd 159, 165, on the ground that the instrument was not only executed but delivered in Arizona. In the *Carrolton* case, the Court in the course of its finding that there was jurisdiction over the defendant said at p. 163:

> "Jurisdiction there now is if the defendant can be said, as stated in McKee, supra, to have more than 'infinitesimal' 'contacts' here (20 N.Y.2d 377, 382, 283 N.Y.S. 2d 34, 37, 299 N.E. 2d 604, 607)—and to the extent, at least, of being able to determine on the facts that the cause of action upon which he is being sued has resulted from his having performed, as said in Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L. Ed. 2nd 1283, 'some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws'."

Similarly in *Franklin National Bank* v. *Krakow,* 295 F. Supp. 910 (U.S.D.Ct. D. of C. 1969) cited on page 17 of Fidelity's brief, the bank's officers actually went to the defendant's place of business in the District of Columbia where they entered into the loan agreement.

In *Ferrante Equipment Co.* v. *Lasker-Goldman Corp.*, 31 App. Div. 2nd 355, 297 N.Y.S. 2nd 985 (1st Dept. 1969) cited on page 17 of Fidelity's brief, the defendant executed an indemnity agreement in New Jersey indemnifying the plaintiff insurance company against losses it might sustain out of a subcontract to be performed by a third party, in New York. In finding that there was no New York contact whatsoever, the court said at p. 986:

> "The liberal statutory criterion (CPLR 302, subd. [a], par. 1) is not met by the unilateral acts of others engaged in performance of the subcontract in New York, nor by the circumstance that the appellant non-domiciliary may derive 'commercial benefit' from such contract. The mere receipt by a nonresident of benefit or profit from a contract performed by others in New York is clearly not an act by the recipient in this State sufficient to confer jurisdiction under our long-arm statute."

This is different from the instant case where the defendant is the beneficiary of its own contract having received a substantial sum of money as the proceeds of a loan made to it in New York by a New York bank. The source of the funds is here in New York. The loan was made here. The money was deposited here and when transferred out of Fidelity's account at Sterling, it went into still another New York bank. Clearly, Fidelity chose to transact this business in New York. In a recent opinion by Judge Lasker in *National Bank of North America* v. *Bennett* (So. D. N.Y. case No. 71 Civ. 2021, not yet reported) where the court sustained jurisdiction under the "long arm" statute in an action on a note, it relied partially on the fact that the nonresident defendant directed

the plaintiff bank to pay the loan proceeds to Shields & Co., a New York stockbroker and on the fact that the defendant maintained an account at the plaintiff bank in New York. The point of the matter is that the "purposeful activity" of Fidelity in New York in the present case is not only that Sterling transferred the loan funds to the Morgan Guaranty Bank on Fidelity's instructions but that the transfer shows that Fidelity freely elected to keep the loan funds in New York. Fidelity chose to keep all of the proceeds of the loan at Morgan Guaranty Bank except for the $200,000.00 compensating balance at Sterling.

In *Pacific Concessions Inc.* v. *Savard*, 75 Misc. 2nd 219, 347 N.Y.S. 2nd 484 (Sup. Ct. 1973) cited on page 17 of Fidelity's brief although the court said that "the mere fact that the payments of money were due and made in this state is insufficient to confer jurisdiction * * *," there was no other contact with New York, and the note was incidental to the real business transaction involving the vending of merchandise in a theatre in Colorado where the equipment and merchandise owned by plaintiff was kept. In the instant case the business transaction is the making of the loan and this was done in New York.

Fidelity's reliance on page 22 of its brief on *Fontanetta* v. *American Board of Internal Medicine*, 421 F. 2d 355 (2nd Cir. 1970) is misapplied as is its whole argument commencing on page 21. It is clear that if Fidelity transacted any business in New York by virtue of any of the acts recited herein, namely, the mailing of the note to New York, the obtaining of a two million dollar line of credit in New York, the borrowing of two million dollars

in New York, the maintenance of its bank account with Sterling in New York, the deposit of the loan proceeds in its bank account at Sterling in New York, the order given by Fidelity to transfer the loan funds to its bank account in Morgan Guaranty Trust Company in New York—if any one of these acts was a transaction of business in New York, which it was, then the cause of action arises therefrom and New York has jurisdiction. At the very bare minimum, the borrowing of money from a New York bank constitutes the transaction of business in New York for the purpose of subjecting the borrower to *in personam* jurisdiction of the New York courts. *Irving Trust Company* v. *Smith, supra.* That alone in and of itself is a sufficient basis for *in personam* jurisdiction over Fidelity and nothing further need be considered.

POINT II

There was no alteration of the note.

There are two notations, "9¼" on the note, one in the upper left hand corner and the other to the right of the Fidelity Mortgage Investors' symbol (Appendix 86a to 88a). Each of these notations was made by an employee of the bank in pencil in the course of keeping the bank's records (Appendix 86a). An examination of the note will show that the marks do not alter or change any of the language of the note and that they are but two of many other pencil notations, all made by bank employees in connection with the record keeping of this transaction in the usual course of business. The defendant had agreed to the 9¼% rate

and had in fact confirmed it in writing (Appendix 61a). All of the notations refer either to the rate, the dollar amount of discount charge, the defendant's account number or to the reduction in payment of the note. (See copy of note Appendix 88a). It is a common practice for banks to make such notations on all of their notes (Appendix 86c). See also *Falvo* v. *Provenga*, 113 Misc. 644, 233 N.Y.S. 653 (1929).

Nor was the presentation of an affidavit by the plaintiff's attorney for 9¼% interest on the default judgment anything more than the attorney's understanding of the rate which the bank records showed (Appendix 84a).

The cases cited in Fidelity's brief are not at all in point. In every one of those cases there was a material change in that the insertions altered the agreement of the parties. In this case, the plaintiff did not insert any new provision in the note. There was no alteration. It was merely a pencil notation as to the already agreed rate, namely 9¼%. New terms were not added. Surely the defendant did not expect that if it defaulted there would be no interest or that its default would benefit it with a lower rate of interest.

As a matter of fact in *Clifton Mercantile Co.* v. *Gillaspie*, 15 S.W. 2d 607 (Texas 1929), cited by Fidelity on page 28 of its brief, the Court said:

> "It is well established that a marginal notation on a note, made by the payee thereof, for purposes of reference or as a memorandum of a collateral agreement, does not constitute a material alteration of such note. The question as to whether the memorandum made upon the note becomes a part thereof, so as to constitute a material alteration of the note, is largely deter-

> minable by the position of the added words, coupled with the intention with which the same is placed thereon and the legal effect of the addition on the contract itself."

It is said in New York Jurisprudence—Alteration of Instruments, Section 32,

> "* * * if an interest clause is added to a note, innocently and with intent to express the real bargain of the parties, such alteration will not vitiate the note. So also marginal notations and indorsements on instruments, relating to interest thereon, are ordinarily regarded as constituting mere memoranda * * *"

And in Section 36 of New York Jurisprudence—Alteration of Instruments,

> "* * * the making of a notation upon or an addition to an instrument does not constitute an alteration thereof where there is no intent to change the effect of the instrument, but merely to make a memorandum upon it. Thus, notations entered on notes by bank officials and employees as part of their practice in dealing with commercial paper are ordinarily not material alterations, at least where such notations are obviously extraneous memoranda * * *"

Alterations made on the note must not only be material but made with fraudulent intent in order to vitiate the note. Thus in *Levy* v. *Arons,* 81 Misc. 165, 142 N.Y.S. 312 (1913) where the payee inserted the words "with interest", after execution of the note, it was held not to be a material alteration because there was no fraudulent intent in adding said words which merely expressed the bargain of the parties.

Similarly it was said in *Falvo* v. *Provenga, supra,* that a red ink notation, "with interest" made by a banker on

the face of a note was not a material alteration and the Court in so concluding said that it is a common practice of bank officials and employees, as every one familiar with banking must know, to make such notations on the face of the note.

As to Fidelity's specious argument that the note was materially and fraudulently altered, it is quite clear from the record that there was no alteration. The affidavit of Anthony Grosso (Appendix 86a) shows that it is a routine practice for the bank to make pencil notations on the face of all notes indicating the discounted interest rate. Incidentally, Fidelity's repeated reference to the note in this case as "non-interest bearing", commencing at the very outset of its brief and constantly repeated throughout are patently misleading and characteristic of the sham nature of the spurious issue of fact Fidelity seeks to create. Fidelity is well aware that the note was discounted and the amount of the discounted interest included in the face amount of the note. The pencil notation simply indicates the rate of interest discounted in advance.

In an attempt to disprove Anthony Grosso's affidavit that all the bank's notes are routinely marked with the interest rate (Appendix 86a) Fidelity's attorney, in his affidavit (Appendix 91a, 92a), attached unclear copies of Sterling's notes that he found in the court records of other cases which appeared to have no notations as to interest rate. Sterling's attorney then produced clear copies of the notes for the District Court (Appendix 107a-112a) showing the marginal notations, thereby reenforcing Anthony Grosso's statement that all the bank's notes routinely bear such notations. Unfortunately, Fidelity has seen fit to use the

poor quality of the appendix prepared by Fidelity to adhere to this discredited position (Appendix 109a-112a). The Court is respectfully referred to the original record before it to see said notations in all their clarity.

Since the note was not materially altered, the question of whether an alleged material alteration was fraudulent is not in question. However, not having any defense to this action Fidelity (through its attorneys) makes the unprincipled claim, without any basis of fact that Sterling's attorney committed a fraud on the court by either causing an alteration to be made or using an alteration already made to obtain a higher rate of interest than to which it was purportedly entitled. Fidelity on the basis of such an unfounded charge seeks to avoid payment of a multi-million dollar debt.

This is indeed a "chilling" theory as Judge Frankel says in his opinion (Appendix 15a), a thoroughly reckless charge and not excused by misguided zeal. Sterling's attorney has stated under oath in his affidavit (Appendix 84a) that Fidelity's claim of misrepresentation is without any basis in fact. The attorney simply looked at the bank's records when preparing the default judgment and took the 9¼% rate of interest as shown therein. Furthermore, there never was any alteration of the note since the notations were not changes but evidenced the agreement of the parties. See Fidelity's letter (Appendix 61a). There is not a hint of any fraudulent intent on the part of the bank's officers, employees or attorney except as fabricated by Fidelity.

It is well established that in order to be fraud, there must be intent. Therefore, the marginal notation of "9¼"

written on the note by Sterling's employees would have to have been made by them with the intention of charging a rate of interest to which the parties had not agreed. The record is clear that the parties agreed to a 9¼% interest rate which had already been charged, discounted and deducted from the face amount of the note. This is not denied by Fidelity. Indeed it is admitted. It is also axiomatic that the parties intend that a note be paid on its due date. The agreement of the parties therefore was that Fidelity borrow two million dollars at 9¼% discounted and that Fidelity repay the note on the due date as set forth therein. The notation "9¼" does not change their agreement.

Fidelity seems to claim that the very entry of a default judgment by Sterling calling for 9¼% interest after maturity constituted a fraudulent and material alteration of the note. For the judgment to be fraudulent, it means that the agreement of the parties was changed by fraud. Assuming for the sake of argument that the parties had not agreed that post maturity interest would continue at the same rate of the loan, namely 9¼%, then the fact situation most favorable to Fidelity that could be conceived is that there was no agreement as to post maturity interest. As a simple matter of logic, on such an assumed state of facts, the charging of 9¼% interest upon entry of judgment could not have been a change in the agreement of the parties since there was no agreement. Assuming *arguendo* that this was the case, it would not have constituted an alteration of the instrument. Fidelity's remedy would have been to have the judgment interest reduced. It has already been given the lower rate by Sterling's concession reducing its interest demand to 6% (Appendix 16a).

The cases cited by Fidelity do not support its contention that the marginal notation of "9¼%" constitutes an alteration of the note much less material or fraudulent. On the contrary, it is the well established practice of banks as recognized by the Courts to make marginal notations on notes expressing the interest rate and other bookkeeping entries. Fidelity's claim of impropriety on the part of Sterling's counsel is wholly specious and contrived, without foundation in fact and is nothing short of scandalous.

Conclusion

It is respectfully submitted that the judgment entered below should be affirmed. There was *in personam* jurisdiction over Fidelity. There was no triable issue of fact as to Fidelity's defense of an alleged material and fraudulent alteration of the note.

Respectfully submitted,

HARRY GURAHIAN
Attorney for Plaintiff-Appellee

Service of 3 copies of the within BRIEF is hereby admitted this 18TH day of JUNE 1974

Signed Lord, Day & Lord

Attorney for Defendant-Appellant

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